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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

Coordination Proceeding Special Title (Rule 1550(b)) **CELLPHONE TERMINATION FEE CASES**	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4332 **JOINT MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** Date: February 17, 2005 Time: 9:00 a.m. Place: Dept. 22 Judge: Hon. Ronald M. Sabraw

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T-Mobile, Verizon Wireless, Sprint and Nextel respectfully submit this joint opposition to Plaintiffs' motion for class certification. Separately, Defendants submit individual opposition briefs that address Defendant-specific issues raised by Plaintiffs' motion.

I. INTRODUCTION

Through these actions, Plaintiffs purport to challenge provisions in Defendants' service agreements that impose early termination fees ("ETFs") on customers who elect to terminate their wireless telephone service before the end of the prescribed contract term. Plaintiffs have moved for class certification, claiming, among other things, that common issues of fact and law predominate over individual issues. Plaintiffs' proposed class is breathtakingly broad, consisting of "[a]ll California consumers who currently subscribe under a post-paid plan to the defendant's wireless services or who have paid an ETF to or have been charged an ETF by the defendant at any time from July 23, 1999 until the present." Plaintiffs' Motion at 6. Given that "post-paid" customers – i.e., those who pay for wireless services after-the-fact, rather than pre-paying for such services – constitute the vast majority of Defendants' wireless customers, the proposed class includes most of Defendants' current customers *as well as* all former customers who paid, or did not pay but were charged, an ETF during the class period.

Plaintiffs' proposed class – and any other class purporting to effect an across-the-board challenge to Defendants' ETF provisions – suffers from several incurable defects, each of which precludes class treatment. First, far from creating a defined community of interest among members, the class is riven with inherent conflicts among the proposed class members. As shown below and in Defendants' evidentiary and expert submissions, most members of the proposed class benefit from term contracts that include ETF provisions because they pay lower rates and reduced up-front costs to sign up for wireless service, including the cost of the wireless phone provided with the contract. If Defendants were precluded from enforcing their existing ETF provisions, as Plaintiffs seek to accomplish through these actions, the result would be an increase in monthly charges and/or up-front subscription or handset costs to customers. Such increases in charges and costs would damage, rather than benefit, most members of the proposed class, particularly those who never paid an ETF and thus would not be entitled to restitution through these actions.

Second, fundamental conflicts exist even among those former subscribers who actually paid an ETF, because the result of the primary relief that Plaintiffs seek – invalidation of the ETFs under Civil Code § 1671(d) – would be that some of the proposed class members would owe Defendants money, rather than being entitled to recover money from Defendants. That is because the only function of § 1671(d), even if this Court were to find the ETFs to be invalid under that section, would be to preclude Defendants from enforcing the ETFs *as a substitute for actual damages*. Even if an alleged liquidated damages provision is deemed unenforceable under § 1671(d), "breaching parties *remain liable* for the actual damages resulting from the breach." *Hitz v. First Interstate Bank*, 38 Cal. App. 4th 274, 288 (1995) (emphasis added). Thus, a fundamental conflict exists between those former subscribers who might be able to show that the amount of the ETF they paid would exceed any amounts they owe as damages because of their early termination, and other former subscribers who would owe Defendants money as a consequence of their early termination.

Third, under any variation of Plaintiffs' proposed class, any given subscriber's right to recover – or even to pursue the claims alleged in these actions – will depend on myriad individual issues of fact. For those class members who did not pay an ETF, but are by contract subject to one if they were to terminate prematurely, the Court would need to determine individually whether they actually want to terminate service but feel unfairly "tethered" by the ETF, or whether instead they are satisfied with the contract they signed and the service to which it entitles them. After all, if a subscriber is satisfied with his or her wireless service agreement, ETF and all, then the subscriber lacks standing, injury and causation, and cannot recover under any of the Plaintiffs' theories. Making that kind of determination would require literally millions of individualized inquiries into each such subscriber's state of mind,[1] and a class action is exactly

[1] Even that might not work. When Plaintiff Christina Nguyen was asked at her deposition whether she would terminate service with T-Mobile if there were no ETF, she testified: "I don't

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the wrong mechanism for such an exercise. For those proposed class members who terminated their agreements and paid an ETF, the Court would likewise have to engage in a highly individualized inquiry to determine whether these class members suffered any injury as a result of the ETF and thus have standing. In particular, the Court will need to ascertain whether each proposed class member's liability to a Defendant for terminating his or her agreement exceeded the ETF that the class member paid. This inquiry is contingent upon numerous individualized factors, such as a subscriber's price plan, the subscriber's past usage history, and the point in time that the subscriber terminated his or her agreement.

Fourth, many of the proposed class representatives do not even belong to the class they purport to represent, and none has claims typical of those alleged on behalf of the class. Most of the named Plaintiffs did not pay, and were not charged, an ETF. Indeed, as to T-Mobile and Nextel, *there is no named Plaintiff who claims to have been charged an ETF.* As further described below, these defects alone make it impossible to grant class certification, both because Plaintiffs cannot possibly represent adequately the interests of the alleged class members, and because their claims are not typical of the alleged class.

For these reasons and the additional reasons set out below and in Defendants' separate memoranda, Plaintiffs' motion should be denied.

II. PLAINTIFFS' CAUSES OF ACTION

Plaintiffs' core allegation is that Defendants' ETFs are unlawful liquidated damages penalties in violation of Civil Code § 1671(d). Plaintiffs allege that each Defendant requires postpaid subscribers to agree to a one- or multiple-year contract at the inception of service, and sometimes as a condition of renewal, and that if the subscriber terminates within that contract period, he or she is charged an ETF. Plaintiffs claim that the ETFs violate § 1671(d) because they are not a reasonable estimate of Defendants' contract damages and it is not

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know." Nguyen Depo at 114:7-12 (Declaration of Zachary J. Alinder ("Alinder Decl."), Ex. F). Millions of subscribers might give the same answer, making it impossible to ascertain who, if any, of the Defendants' current subscribers are in the proposed class.

impracticable or extremely difficult to fix the actual damage. Plaintiffs allege that the ETFs cause two types of harm: first, that they harm *current* customers who want to terminate service but are deterred from doing so; second, that they harm *former* customers who terminated early and had to pay the fee. *See* Second Consolidated Amended Complaint [Early Termination Fees] Against T-Mobile hereinafter "SAC [T-Mobile]"), ¶¶ 22-33, 40-43; First Consolidated Amended Complaint [Early Termination Fees] Against Sprint Defendants (hereinafter "FAC [Sprint]") ¶¶ 26-37, 44-47; First Consolidated Amended Complaint [Early Termination Fees] Against Nextel Defendants (hereinafter "FAC [Nextel]"), ¶¶ 24-35, 42-45; First Consolidated Amended Complaint [Early Termination Fees] Against Verizon Wireless (hereinafter "FAC [Verizon Wireless]"), ¶¶ 22-33, 40-43.

Plaintiffs' other claims derive from the § 1671(d) claim. Plaintiffs allege that the ETFs violate the Consumer Legal Remedies Act, Civil Code §§ 1770(a)(14), (a)(19) ("CLRA");[2] the Unfair Competition Law, Bus. & Prof. Code § 17200, *et seq*. ("UCL");[3] and Plaintiffs seek restitution for ETFs paid by former customers under unjust enrichment and money paid theories.[4] In addition to restitution, Plaintiffs seek a permanent injunction enjoining Defendants from using ETFs; compensatory damages; disgorgement of profits; the imposition of a constructive trust; and punitive damages.[5]

III. LEGAL STANDARD FOR CLASS CERTIFICATION

It is "without question that not all multiple consumer cases lend themselves to a class proceeding." *Collins v. Safeway Stores, Inc.*, 187 Cal. App. 3d 62, 68 (1986). Rather,

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[2] *See* SAC [T-Mobile], ¶¶ 44-48; FAC [Sprint] ¶¶ 48-52; FAC [Nextel] ¶¶ 46-50; FAC [Verizon Wireless] ¶¶ 44-48.

[3] *See* SAC [T-Mobile], ¶¶49-69; FAC [Sprint] ¶¶ 53-68; FAC [Nextel] ¶¶ 51-66; FAC [Verizon Wireless] ¶¶ 49-64.

[4] *See* SAC [T-Mobile], ¶¶70-79; FAC [Sprint] ¶¶ 69-78; FAC [Nextel] ¶¶ 67-76; FAC [Verizon Wireless] ¶¶ 65-74.

[5] *See* SAC [T-Mobile], p.17; FAC [Sprint], p.17; FAC [Nextel], p.16; FAC [Verizon Wireless], p.16.

Plaintiffs have the burden to prove that class certification is appropriate. *Washington Mutual Bank v. Super. Ct.*, 24 Cal. 4th 906, 922 (2001); *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 470 (1981); *Hamwi v. Citinational-Buckeye Inv. Co.*, 72 Cal. App. 3d 462, 471-72 (1977). Plaintiffs must "prove each required element for class certification." *Washington Mutual*, 24 Cal. 4th at 922-23.

The most critical requirement that Plaintiffs must show for class certification is the existence of a "well-defined community of interest in the questions of law and fact affecting the parties to be represented." *Daar v. Yellow Cab Co.*, 67 Cal. 3d 695, 704 (1967). This common theme underlies the requirements that common issues of law or fact predominate over individual issues as to each cause of action; that the claims of the proposed class representatives, and the defenses to those claims, are typical of the class; and that the proposed class representatives can fairly represent the class. *Dart Indus.*, 29 Cal. 3d at 470. In addition, Plaintiffs must show that the class is ascertainable and that adjudication as a class action would confer substantial benefits on the litigants and the Court. *See Washington Mutual*, 24 Cal. 4th at 922-23; *see also Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000); *see also* Code Civ. Proc. § 382 (general class certification statute); *see also* Civil Code § 1781(b)(2) (governing class certification under the CLRA). A "failure of the [Plaintiffs] to satisfy *any one* of the prerequisites is fatal to class certification." H.B. Newberg & A. Conte, NEWBERG ON CLASS ACTIONS § 7.18 (4th ed. 2002) (emphasis added) (*citing Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982)). These requirements apply regardless of whether the Plaintiffs move to certify a class for monetary and injunctive relief or solely for injunctive relief. *See Kennedy v. Baxter Healthcare Corp.*, 43 Cal. App. 4th 799, 809 n.5 (1996); Fed. R. Civ. Proc. 23(a), (b)(2).

The trial court's duty is correspondingly strict. It cannot simply accept the class proponents' assurances of commonality, but must conduct a "rigorous analysis" that ensures that class proponents have met each of the prerequisites for class treatment. *Gen. Tel. Co.*, 457 U.S. at 161. Specifically, the Court must examine closely the manner in which the claims and likely defenses will be litigated to ensure that the proponent of the class has met its burden of proving that class treatment is appropriate. *See Linder*, 23 Cal. 4th at 443. The court "must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996). "Absent knowledge of how [the individual] cases would actually be tried . . . it [is] impossible for the court to know whether the common issues would be a 'significant' portion of the individual trials." *Id.* at 745. "That a trial court retains the power to consider decertification when a class action later proves to be unmanageable should not serve to lessen the court's initial responsibility to grant certification only where all of the requirements for certification have been met." *Washington Mutual*, 24 Cal. 4th at 927 (citing *Vasquez v. Sup. Ct.*, 4 Cal. 3d 800, 821 (1971)). Thus, although Plaintiffs need not prove liability and remedies at this stage, the Court may not treat class certification as a pleading issue; rather, Plaintiffs must show how they would prove their claims on a classwide basis.

IV. PLAINTIFFS' MOTION SHOULD BE DENIED

A. Class Conflicts Defeat Adequacy of Representation and Prevent Class Certification

Plaintiffs' claims fundamentally conflict with the interests of many, if not most, members of the class they purport to represent. The primary relief sought by Plaintiffs is an order invalidating Defendants' ETF provisions, enjoining Defendants from further using an ETF, and awarding restitution for ETFs already paid. These claims for relief create at least two critical conflicts within the putative class.

First, there is a conflict between those proposed class members who terminated their agreement before the end of the agreement's one or multiyear term and those who did not and are current customers of Defendants. The ETF is an important part of Defendants' pricing for wireless services. Defendants incur large up-front costs, including handset subsidies, when acquiring new customers, and they charge monthly access fees that recover those costs over time. *See* Affidavit of Joseph P. Kalt, Ph.D. ("Kalt Aff.") ¶¶ II.C.1-II.C.3; Declaration of Jerry A. Hausman, D.Phil. ("Hausman Decl.") ¶¶ 46-47; Declaration of Dr. William Taylor ("Taylor Decl.") ¶¶ 6, 7, 9. The ETF helps assure that these up-front costs will be recovered over the length of the contract period because it encourages customers to fulfill their service agreement. Hausman Decl. ¶ 47; Taylor Decl. ¶ 11. To continue to offer these rate plans in the absence of an ETF, Defendants would have to reduce up-front costs by reducing or eliminating handset subsidies, or they would have to increase monthly access charges, or both. Kalt Aff. ¶¶ II.E & II.E.1-II.E.3; Hausman Decl. ¶¶ 44-45, 48; Taylor Decl. ¶¶ 14, 16; *see also* T-Mobile's and Verizon Wireless' Verified Interrogatory Responses (Alinder Decl., Exs. A, B). The same would be true if the ETF were not eliminated entirely but simply reduced or restructured from the amount currently set by the market, as such a change would still alter the ETF's effect on customer retention and revenue generation. *See* Kalt Aff. ¶¶ II.E & II.E.4.a.

This economic structure creates a conflict between those who chose to terminate their contracts before the end of the prescribed term and those who remain customers. The continuing subscribers benefit from the ETF because it enables Defendants to offer rate plans with reduced handset costs and lower monthly access fees. *See* Kalt Aff. ¶¶ II.D.1, II.E.5.c, III.A.1; *see also id.* ¶ II.C; Hausman Decl. ¶ 49; Taylor Decl. ¶¶ 7, 9. It is in the interest of these subscribers for the Plaintiffs' claims to fail and for the ETF to remain in place. Kalt Aff. ¶¶ II.E.4.a, II.E.2.a & b, II.E.5.c, III.A.1 & 2, III.B.1.b; *see also* Hausman Decl. ¶ 48. For *some* subscribers who terminate, however (but not all, see below), the opposite is the case: they would benefit by having the ETF invalidated and receiving restitution for the ETFs they paid.

It is axiomatic that "a class cannot be certified when its members have opposing interests or when it consists of members who benefit from the same acts alleged to be harmful to other members of the class." *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000); *see also Broussard v. Meineke*, 155 F.3d 331, 337-40 (4th Cir. 1998) (because of conflicts of interest between three distinct groups of class members, the remedial interests of those within the single class were not aligned, infecting class certification and requiring reversal). Because the interests of the continuing subscribers are in direct conflict with the interests of the significantly smaller group who terminated early, class certification should be denied. *See Dart Indus.*, 29 Cal. 3d at 471 (noting that "[w]hen the vast majority of a class perceives its interest as diametrically opposed to that of the named representatives, a trial court cannot equitably grant the named plaintiffs the right to pursue the litigation on behalf of the entire class"); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-27 (1997). Where, as here, "there is a conflict that goes to the 'very subject matter of the litigation,' it will defeat a party's claim of class representative status." *J.P. Morgan & Co., Inc. v. Sup. Ct.*, 113 Cal. App. 4th 195, 212 (2003) (quoting *Dart Indus.*, 29 Cal. 3d at 470).

Second, there is an intractable conflict even among those who actually paid an ETF. That is because many if not most proposed class members who terminated early will owe Defendants actual damages *in excess* of the ETF if the Plaintiffs prevail at trial. *See* Hausman Decl. ¶ 21; Kalt Aff. ¶¶ II.D.2.c, II.E.4.b(1)-(2), III.C.1.a-III.c.1e(2); Taylor Decl. ¶¶ 13, 18. For these proposed class members, the primary relief sought by Plaintiffs – the invalidation of the ETF and restitution for the ETFs paid – will be affirmatively harmful because it will result in those customers *owing money* to Defendants. If this Court were to find the ETFs to be invalid under § 1671(d), this would only preclude Defendants from enforcing the ETFs *as a substitute for actual damages.* Even if an alleged liquidated damages provision is deemed unenforceable under § 1671(d), "breaching parties *remain liable* for the actual damages resulting from the breach." *Hitz*, 38 Cal. App. 4th at 288 (emphasis added).

Class certification is inappropriate where there is even a potential for direct conflict because "some class members derive a net economic benefit from the very same conduct alleged to be wrongful by the named representatives of the class." *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1190 (11th Cir. 2003); *see also Horton v. Citizens Nat'l Trust & Savings Bank*, 86 Cal. App. 2d 680, 684-85 (1948) (holding that class treatment was improper because of a "direct conflict" between class members who desired construction of one-story versus two-story residences). Thus, in *Global Minerals & Metals Corp. v. Super. Ct.*, 113 Cal. App. 4th 836 (2003),[6] the putative class was composed of purchasers of copper products who

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[6] The companion case of *Global Minerals* is *J.P. Morgan & Co., Inc. v. Super. Ct.*, 113 Cal. App. 4th 195 (2003).

alleged that the Defendants had manipulated and thereby artificially inflated copper prices. Relying upon "wide-ranging evidence" that several members of the class were possible beneficiaries of the alleged inflation of copper prices because they had acted in different capacities as both buyers and sellers of copper products, the Court of Appeal held class certification improper because it was "impossible to overlook the *potential* conflicts between class members, even at the preliminary class certification stage." *Id.* at 854 (2003) (emphasis added). Because much of the putative class actually benefits from the ETF, the conflict here is far more than potential. Such insurmountable intraclass conflicts make these actions inappropriate for class treatment.

B. Individualized Issues Predominate for Every Cause of Action

Second, class certification should be denied because common questions of fact do not predominate. Determining whether each class member has a right to recover involves numerous individualized issues, rendering class certification inappropriate. *See Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1123 (1988); *Kennedy v. Baxter Healthcare Corp.*, 43 Cal. App. 4th 799, 810-11 (1996); *Rose v. Medtronics*, 107 Cal. App. 3d 150, 155-57 (1980); *see also City of San Jose v. Sup. Ct.*, 12 Cal. 3d 447, 459 (1974) (noting that the relevant inquiry is whether "*each member's right to recover* depends on facts peculiar to his case") (emphasis added); *Osborne v. Subaru of America, Inc.*, 198 Cal. App. 3d 646, 653-54 (1988).

1. The Requirement That Common Questions Predominate

The existence of some "common questions of law" is not enough to certify a class "where there are diverse factual issues to be resolved" for each claim's elements. *Brown v. Regents of Univ. of Calif.*, 151 Cal. App. 3d 982, 988-89 (1984). Rather, a class may be certified only if "common issues predominate over issues requiring separate adjudication." *Kennedy*, 43 Cal. App. 4th at 810. Plaintiffs' burden on moving for class certification "is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues *predominate*." *Lockheed Martin Corp. v. Sup. Ct.*, 29 Cal. 4th 1096, 1108 (2003). Where, as here, there are numerous, complex and substantial individual factual issues, class certification should be denied. *Osborne*, 198 Cal. App. 3d at 653 ("Certification is properly denied where the individual questions to be decided may prove too complex, numerous and substantial to allow the class action").

2. Individualized Issues Predominate for Current Subscribers Who Are Potentially Subject to the ETF

In this case, each current subscriber's right to recover depends on facts unique to that subscriber. The reason is straightforward. Even if Plaintiffs' allegations concerning the invalidity of ETFs are correct, a subscriber does not have a legal claim, and thus is not part of the class, merely because he or she is a party to a contract that contains an ETF provision. Rather, all of Plaintiffs' claims require proof of standing, injury and causation. This precludes certification of a class of current customers. *See Collins*, 187 Cal. App. 3d at 73 (citation omitted) ("[A] class cannot be so broad as to include individuals who are without standing to maintain the action on their own behalf. Each class member must have standing to bring the suit in his own right.").

a. All of Plaintiffs' Claims Require Proof of Standing, Injury and Causation

(1) Civil Code § 1671

In order to bring a claim under § 1671, a plaintiff must suffer concrete injury. *See, e.g., Beasley v. Wells Fargo Bank,* 235 Cal. App. 3d 1383, 1389-90 (1991) (claim under § 1671(d) challenging fees that were already assessed against the named plaintiff and members of the class). A "statutory violation, 'causing only nominal damages, speculative harm, or the threat of future harm – not yet realized – *does not suffice to create a cause of action.*'" *Garver v. Brace*, 47 Cal. App. 4th 995, 999 (1996) (quoting *Budd v. Nixen*, 6 Cal. 3d 195, 200 (1971)) (emphasis added). Rather, a plaintiff must have a "real interest in the ultimate adjudication because he or she has *either suffered or is about to suffer an injury*." *Holmes v. California Nat'l Guard*, 90 Cal. App. 4th 297, 314-315 (2001) (emphasis added). Because relief under § 1671(d) is "limited to those who suffer damage, making causation a necessary element of proof," a mere violation of § 1671(d) without proof of injury is insufficient to establish standing. *Wilens v. TD*

Waterhouse Group, Inc., 120 Cal. App. 4th 746, 754 (2004) (discussing standing in the context of the CLRA); *see also American Suzuki Motor Corp. v. Sup. Ct.*, 37 Cal. App. 4th 1291, 1295 (1995) (where multiple class action plaintiffs "fail to meet this elementary standard" of suffering some personal injury, "no ascertainable class exists, and a class action may not be maintained").

(2) The UCL

Under the revisions to the UCL affected by Proposition 64, a plaintiff must suffer an "injury in fact" *and* have "lost money or property as a result of" the alleged unfair competition in order to have standing to sue. Proposition 64, § 3 (amending Bus. & Prof. Code § 17204) (Defendants' Request for Judicial Notice ("RJN"), Ex. A). Further, Proposition 64 specifically provides that private parties "may pursue representative claims or relief on behalf of others" under the UCL "only" if they satisfy the "standing requirements" of Proposition 64 and comply "with Section 382 of the Code of Civil Procedure." *See id.* at § 2 (amending Bus. & Prof. Code § 17203). This requirement fully applies to claims for injunctive relief.

Proposition 64 applies to pending cases, such as this one, as other courts have held. *See, e.g., Sumuel v. Advo, Inc., et al.*, No. HG04-145798 (Alameda Super. Ct. Dec. 30, 2004) (Brick., J.) (Defendants' RJN, Ex. B); *Spielholz v. Los Angeles Cellular Tel. Co.*, No. BC186787 (Los Angeles Super. Ct. Dec. 21, 2004) (McCoy, J.) (Defendants' RJN, Ex. C); *Goodwin v. Anheuser-Busch Cos., Inc.*, No. BC310105 (Los Angeles Super. Ct. Dec. 13, 2004) (Lichtman, J.) (Defendants' RJN, Ex. D); *Banales v. AT&T Wireless Servs., Inc.*, No. BC312007 (Los Angeles Super. Ct. Dec. 14, 2004) (Ferns, J.) (Defendants' RJN, Ex. E); *Kim v. Bayer Corp.*, No. BC309936 (Los Angeles Super. Ct. Dec. 10, 2004) (Workman, J.) (Defendants' RJN, Ex. F); *but see California Law Institute v. Visa USA, Inc.*, No. CGC-03-421180 (San Francisco Super. Ct. Dec. 29, 2004) (Kramer, J.) (holding that Proposition 64 does not apply to pending cases, but noting "substantial grounds for difference of opinion" and certifying the question for interlocutory review under Code of Civil Procedure § 166.1) (Defendants' RJN, Ex. G).

(3) **The Consumer Legal Remedies Act**

Like § 1671(d), the CLRA "does not create an automatic award of statutory damages upon proof of an unlawful act. Relief under the CLRA is limited specifically to those who suffer damage, making causation a necessary element of proof." *Wilens*, 120 Cal. App. 4th at 754. To have standing under the CLRA, individual class members must prove *actual* harm suffered as a result of the ETF provision. *Id.*

(4) **Unjust Enrichment and Money Paid**

Plaintiffs' claims for unjust enrichment and money paid also require proof of standing, injury and causation. *See* June 2, 2004 Order Sustaining Demurrer at 1-2 ("If the named plaintiff has never paid an early termination fee, then he or she cannot assert individual claims for unjust enrichment or money paid.") (Defendants' RJN, Ex. H).

b. **The Existence of Standing, Injury and Causation for Current Customers Requires Knowing Their State of Mind**

Because all of Plaintiffs' claims require proof of standing, injury, and causation, and because these requirements create significant individual issues among current subscribers, class certification should be denied.

To establish injury and simple "but for" causation, current customers must show that in the absence of the ETF provision, they would somehow benefit. Presumably, Plaintiffs intend to show that were it not for the ETF, customers *would* terminate their agreements and subscribe to different wireless plans that either would be less expensive or would offer superior service.[7] Any such showing inherently would require subjective inquiries concerning each

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[7] Plaintiffs' motion for class certification asserts in a footnote that Defendants' ETFs "restrict competition and artificially inflate the price for all of the defendants' wireless services." Plaintiff's Motion at 2 n.2. However, Plaintiffs cite no evidence to support such a theory, nor does their motion argue that such a theory presents a ground for class certification, nor do the complaints allege an antitrust theory based on the ETFs. Plaintiffs' failure thus far to make any "factual allegations of specific conduct in furtherance of the conspiracy to eliminate or reduce competition" in connection with the ETF renders any possible claim of conspiracy "legally insufficient." *Freeman v. San Diego Ass'n of Realtors*, 77 Cal. App. 4th 171, 196 (1999) (emphasis added); *see also Chicago Title Ins. Co. v. Great W. Fin. Corp.*, 69 Cal. 2d 305, 316-17

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subscriber's state of mind, possession of relevant knowledge, and motivation to switch plans. In order to determine who would be in the class, for example, the Court would have to determine:

- which customers sought out and obtained information about alternatives to the plan under which the customers contracted;
- which customers were motivated to seek lower-cost plans;
- which customers, knowing of the ETF, wanted to terminate their contracts;
- which customers' decision to remain with their wireless provider was affected, and to what extent, by the ETF's existence;
- which customers would *not* have terminated even if there were no ETF because they are satisfied with their service;
- which customers would not have terminated for other reasons, such as the inconvenience of changing providers or a belief that all of the companies offer roughly comparable service;
- which customers would have terminated, but would have chosen a more expensive rate plan, and thus would not have lost money or property;
- which customers would have terminated and would have chosen a cheaper rate plan with poorer service, leaving an individualized question as to whether such customers would have suffered legally cognizable damages;
- which customers would have terminated and would have chosen a rate plan with a different carrier that was equivalent in both price and service quality to the plan they already had or could have had with their current provider (without incurring an ETF), meaning the customer had no damages at all.

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(1968). Articulating such a theory for the first time on reply as a basis for class certification would be improper, and the Court should disregard any effort on Plaintiffs' part to do so. In any event, such a claim lacks merit because the wireless industry in fact is highly competitive, as economic evidence demonstrates and as expert agencies have repeatedly found. *See* Hausman Decl. ¶¶ 34-44; Kalt Aff. ¶ II.E.2.c & n.10; Taylor Decl. ¶ 8.

See Kalt Aff. ¶¶ III.C.3, III.C.3.a-b; *see also id.* ¶ II.E.5.b.

As this listing demonstrates, many current customers are not injured by the ETF policy, and even those that are may not be injured in the same way. To the contrary, the deposition testimony even of the named plaintiffs suggests that many customers: (1) do not know or care if they are subject to the ETF; (2) would not change service or rate plans, even if there were no ETF; (3) could not state how, even if they could or would have switched carriers or rate plans, they suffered any economic damage, or even a non-economic loss in the quality of service. *See* pages 23-24, below. Further, common sense suggests that even if Defendants' ETFs were invalidated, or had never existed, a significant number of customers still would stay with their current wireless provider and rate plan. *See* Kalt Aff. ¶ III.C.3.b; *see also* Zill Depo. at 80:16-17 ("I've just stayed with Sprint out of inertia.") (Alinder Decl., Ex. C).

Plaintiffs have not provided any viable method even to determine who is in the proposed class of current customers, nor does such a method exist short of interviewing every single customer. Given the millions of customers that Defendants have in California, such an individualized inquiry would be virtually impossible, thus rendering class certification inappropriate. *Cf. Castano,* 84 F. 3d at 743 n.15 (reversing certification where "[e]ach class member's knowledge about the effects of smoking differs, and each plaintiff began smoking for different reasons"); *Stilson v. Reader's Digest Ass'n, Inc.*, 28 Cal. App. 3d 270, 274-75 (1972) (affirming denial of class certification of claims alleging unauthorized use of names for commercial exploitation where "the court would be required to examine the mental and subjective state of each of the millions of plaintiffs, since in each case such individual appraisal is of the essence of the claim for damages and, indeed, of the cause of action"); *see also In re: Tobacco Cases II,* 2001 WL 34136870, *10-*12, No. JCCP 4042 (Cal. Sup. Ct. Apr. 11, 2001) (Prager, J.) (denying class certification of claims under CLRA based on defendants' cigarette advertising because each plaintiffs' claim would depend on the nature of advertisements disseminated by each defendant, whether and to what extent such advertising was seen and relied upon by each individual plaintiff, and individualized information concerning each plaintiff's alleged addiction and damages); *see also Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp 595, 603 (S.D.N.Y. 1982) (denying class certification where all class members purchased defective tires, but only some class members sustained injuries resulting from the tires, and therefore "the majority of the putative class member have no legally cognizable claim" and "the action necessarily metastasizes into millions of individual claims").

c. Other Individualized Issues for Current Customers

The proposed class of current customers also raises additional individualized determinations regarding each class member's right to recover.

Plaintiffs seek to include in the class "[a]ll California consumers who currently subscribe under a post-paid plan to defendant's wireless services . . ." Plaintiffs' Motion at 6. But many such customers are not even potentially subject to the ETF if they terminate service, for example, customers who have fulfilled their one- or two-year contract term and simply continue on a month-to-month basis. For these customers to show injury or causation, they would have to prove that at some point in the past, when the ETF used to apply to them, there was a period when they wanted to terminate their service plan but were deterred by the ETF, and that their inability to switch providers without incurring an ETF injured them. Possibly, *none* of these customers could credibly prove this, since their continued service with their wireless provider even *after* the ETF became inapplicable might render unbelievable a claim that they *used* to feel tethered. In any event, Plaintiffs have offered no way to identify which current subscribers were "formerly tethered" by the ETF, let alone what their injury or damages would be, short of interviewing all of Defendants' millions of subscribers. *See* Kalt Aff. ¶ II.C.2.e.

In addition, substantial numbers of Defendants' customers renew their contractual commitment, along with the ETF provision, at the expiration of their original term, typically in exchange for a new discounted handset or special rate promotion. *See id.* ¶ III.C.2.b. Clearly, if a subscriber is aware of the ETF policy and has the opportunity to terminate service without paying the ETF, but then chooses to renew his or her contractual term, together with the ETF, in exchange for a monetary benefit, Defendants would have a mitigation defense to any claim brought by such a customer.[8] Individualized inquiry would therefore be necessary to determine each renewing subscriber's knowledge of the ETF provision and whether he or she attempted to mitigate the harm purportedly caused by the ETF.

3. Individualized Issues Predominate for Former Customers Who Were Charged an ETF

Individualized questions of fact also predominate as to former customers who paid an ETF. Again, the reason is straightforward: Under § 1671(d), "breaching parties *remain liable* for the actual damages resulting from the breach," even if the court invalidates a liquidated damages provision. *Hitz*, 38 Cal. App. 4th at 288 (emphasis added). Thus, if this Court were to hold that the ETF is a liquidated damages provision and also is invalid, Defendants will be able to recover actual damages attributable to each class member's early termination of that customer's service agreement. Indeed, many if not most proposed class members, such as those who terminated their wireless service agreement at or near the beginning of the agreement's term, would face damages that *exceed* their ETF. *See* Hausman Decl. ¶ 21; Kalt Aff. ¶¶ II.D.2.c; *see also id.* ¶¶ III.C.1.a, III.C.1.a(1), III.C.1.d; Taylor Decl. ¶¶ 13, 18. For example, named Plaintiff Molly White, who terminated her service with Verizon Wireless five months into a two-year contract, would likely owe Verizon Wireless more than $1000 if the ETF were invalidated, *see* Hausman Decl. ¶ 22 – a fact that is currently reflected in a cross-claim filed by Verizon Wireless against Ms. White. Thus, Ms. White was made better off by the presence of the ETF. For class members such as Ms. White, an invalidation of the ETF, even with the prospect of full restitution, would result in a net loss. And if a former customer's liability for terminating his or

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[8] "Under California law, whether the defendant's conduct was intentional or negligent, innocent or malicious, a plaintiff injured by the defendant's wrongful act is bound 'to exercise reasonable care and diligence to avoid loss or minimize the resulting damages and cannot recover for losses which might have been prevented by reasonable efforts and expenditures on his part.'" SCHWING, CALIFORNIA AFFIRMATIVE DEFENSES § 36:1 (2004). Therefore, "[a] plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion." *Valla De Oro Bank, N.A. v. Gamboa*, 26 Cal. App. 4th 1686, 1691 (1994). Further, the plaintiff "has an obligation to avoid unwarranted enhancement of damages 'through passive indifference or stubborn insistence upon a conceived legal right....'" *Id.*

her contract would have exceeded the ETF, he or she lacks standing to sue because he has not suffered any net economic injury as a result of the ETF. *See, e.g., Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir. 1982) (holding that plaintiff who overall benefited from defendant's conduct lacked standing because "while the amount of damages need not be precise, the fact of damage, consisting of *net economic loss* suffered by the plaintiff, has been established as the gravamen" of a statutory antitrust action (emphasis added)); *Byrnes v. Faulkner, Dawkins & Sullivan*, 550 F.2d 1303, 1313-14 (2nd Cir. 1977) (holding that complainant lacked standing to assert claims because he "*benefited overall*" by the alleged wrongful conduct and thus "sustained no damages cognizable" under the federal securities laws (emphasis added)).

Whether the actual damages attributable to a former customer exceed the ETF would be a highly individualistic inquiry. The actual damages caused to Defendants by early termination could include the greater of reliance and restitution (*i.e.*, for equipment or set-up costs) or alternatively expectation and consequential damages (*i.e.*, lost profits). Equipment or set-up costs are recoverable as reliance damages. *See, e.g.*, DOBBS, LAW OF REMEDIES § 12.3(1) at 51 (2d Ed. 1993) (citing *L. Albert & Sons v. Armstrong Rubber Co.*, 178 F.2d 182 (2d Cir. 1949) (awarding reliance damages for expense of building footings to accommodate machines that were never delivered)). Expectation damages in the form of lost profits also would be available to Defendants. *See Grupe v. Glick*, 26 Cal. 2d 680, 692-693 (1945). "[D]amages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent." *Id.*; *see also S.C. Anderson, Inc. v. Bank of America*, 24 Cal. App. 4th 529, 535 (1994) (noting that some uncertainty as to the amount of profits is not fatal).

Thus, determining the actual damages owed to the Defendant for any particular subscriber's early termination, assuming the invalidating of the ETF, would require information concerning the specific handset each former customer bought, how much that handset cost, and to what extent its cost was subsidized. Kalt Aff. ¶¶ III.C.1.c, III.C.1.e, III.C.1.e(2); Hausman Decl. ¶ 60; Taylor Decl. ¶ 18. It also would require calculation of the Defendant's lost profit owing to each customer's early termination. Kalt Aff. ¶¶ II.C.1.c; Taylor Decl. ¶ 18; *see also*

Hausman Decl. ¶¶ 17-20. Calculating lost profit would involve more than just multiplying monthly access fees by the number of months remaining on the contract and subtracting the cost of providing service; it also would require estimating the overage fees each particular customer would have incurred in the remaining months, as well as other fees, such as for ring tones or roaming, that would be based on each customer's individual usage pattern.[9] Kalt Aff. ¶¶ II.C.1.c, III.C.1.e, III.C.1.e(2); Hausman Decl. ¶¶ 17-20; Taylor Decl. ¶ 18.

Accordingly, any determination of which customers who paid an ETF can establish standing, injury or causation would require a individualized, fact-specific inquiry for every class member. Plaintiffs' assertion that individual differences in calculating the amount of damages should not preclude certification misses the point. As the Court of Appeal held in *Wilens v. TD Waterhouse Group, Inc.*, 120 Cal. App. 4th 746 (2004), that argument is "flawed" where, as here, the existence of injury goes to each class member's very *right* to any relief at all. *Id.* at 754 (citation omitted); *see also Basurco v. 21st Century Ins. Co.*, 108 Cal. App. 4th 110, 119 (2003) (class certification cannot be maintained where "the *existence* of damage, the *cause* of damage, and the *extent* of damage would have to be determined on a case-by-case basis") (emphases added). Although "differences in calculating damages are not a proper basis for the denial of class certification," the "individual issues here go beyond mere calculation; *they involve each class member's entitlement to damages*. Each class member would be required to litigate substantial and numerous factually unique questions to determine his or her *individual right to recover*, thus making a class action inappropriate." *Wilens*, 120 Cal. App. 4th at 756 (emphasis

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[9] The Court may look to the usage history of subscribers who terminated their agreements in order to determine Defendants' lost profits. California law looks to a breaching party's past performance history under the contract to determine the other party's lost profits, even where the past performance may have exceeded the requirements of the contract. *See Kuffel v. Seaside Oil Co.*, 11 Cal. App. 3d 354, 369 (1970). Lost profits incorporating overage fees and other revenues also are recoverable as special damages, which are not "'presumed from the mere breach'" but represent loss that "'occurred by reason of injuries following from'" the breach. *Lewis Jorge Const. Management, Inc. v. Pomona Unified School Dist.*, 22 Cal. Rptr. 3d 340, 345 (Cal. 2004) (citation omitted).

added) (quotation marks omitted); *see also Washington Mutual*, 24 Cal. 4th at 913.[10]

Moreover, inquiring into each proposed class member's actual injury at the class certification stage is necessary here and would not impermissibly reach the merits of the case. *See Linder*, 23 Cal. 4th at 443 (rejecting denial of certification where it is "conditioned upon a showing that class claims for relief are likely to prevail"). Because "class determination will generally involve considerations on the merits that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," a preliminary evaluation of the claims' merits during the certification stage is both proper and warranted. *Global Minerals & Metals Corp. v. Super. Ct.*, 113 Cal. App. 4th 836, 854 (2003).

Because injury and causation would have to be litigated individually for every former customer who paid an ETF, Plaintiffs have failed to meet their burden of demonstrating a predominance of common legal and factual issues. *See Lockheed Martin*, 29 Cal. 4th at 1111.[11]

4. California Appellate Cases Confirm that Class Certification Should be Denied Where Individual Issues Predominate.

California appellate courts have confirmed repeatedly that the existence of one or more common legal issues does *not justify the certification of a class where the entitlement of*

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[10] Plaintiffs cite *Rosack v. Volvo of America Corp.*, 131 Cal. App. 3d 741, 753-54 (1982), for the proposition that class certification is appropriate "even where some members of the class suffered no injury." Plaintiffs' Motion at 8. However, in *Rosack*, the Court inferred the fact of injury from the price-fixing conspiracy that was common to all class members. That is obviously different from this case, where the existence of injury has to be determined on an individual basis for every class member. *See Wilens*, 120 Cal. App. 4th at 754; *Basurco*, 108 Cal. App. 4th at 119. *Rosack* is also inapplicable because it involved a manageable class, which the court itself distinguished from one potentially involving millions of consumers, as Plaintiffs concede is the case here. *See Rosack*, 131 Cal. App. 3d at 760-61; *see also* Plaintiffs' Motion at 2 (describing "potentially millions" of class members for each Defendant).

[11] In addition, the proposed class definition raises another individualized inquiry: Determining which customers who were charged an ETF actually paid it, and how much. Plaintiffs improperly seek to include in the class former customers who were charged but did *not* pay an ETF, but that is overbroad. Such former customers suffered neither of the harms supposedly inflicted by the ETF -- they were not deterred from terminating service, and they did not pay money. Narrowing the class to those who paid the ETF requires individualized inquiry into (1) whether a former customer who was charged an ETF paid it, (2) if a former customer paid some but not all of his outstanding bills upon termination, what fraction of that payment should be deemed allocated to the ETF.

class members to recover depends on individualized factual determinations. In *Wilens v. TD Waterhouse Group, Inc.*, 120 Cal. App. 4th 746 (2004), the putative class was composed of individuals who allegedly incurred damages when their access to the defendants' internet stock trading service was suspended without notice. The *Wilens* court concluded that it could *not* be "presum[ed] that each class member suffered damage by the mere insertion of the termination without notice provision in the [service] agreement," just as it cannot be presumed that the mere existence of ETFs in the current customers' agreements is sufficient to establish classwide injury. *Id.* at 756. Moreover, the court concluded it could not be presumed that "those whose access was terminated without notice suffered damage caused by the termination," just as it cannot be presumed that those early terminating class members who paid an ETF suffered any injury given their prospective liability to Defendants. *Id.* The Court of Appeal thus affirmed the denial of certification on the basis that "individual issues" predominated regarding "each class member's *entitlement* to damages" and "individual right to recover." *Id.* (citations omitted); *see also Lockheed Martin*, 29 Cal. 4th at 1111 (denying class certification where issues involving "each individual class member's right to recover" were "numerous and substantial"). Similarly, in *Quaccia v. DaimlerChrysler Corp.*, 122 Cal. App. 4th 1442 (2004), the Court of Appeal recently affirmed this Court's denial of class certification in a case challenging an alleged defect in a seat belt buckle that had been installed in numerous vehicle models manufactured between 1992 and the present. The Court of Appeal reasoned that each class members' right to recover would depend on highly individualized issues affecting the operation of the buckle, such as the "'location, shielding, and installation of the buckle'" in "'17 different vehicles over 10 model years.'" *Id.* at 1450 (quoting trial court order).

Given that highly individualized issues regarding each class member's right to recover clearly exist in this case, this Court should follow the well-beaten path of prior California decisions and similarly deny class certification.

C. Class Treatment Is Unmanageable and Inferior

Plaintiffs have failed to meet their burden of demonstrating that class treatment is "superior to other available methods for the fair and efficient adjudication of the controversy." *Dean Witter Reynolds v. Sup. Ct.*, 211 Cal. App. 3d 758, 773 (1989). A determination that "class treatment would not ease [the court's] burden [is] *alone sufficient* to defeat class certification." *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 668 (1993) (emphasis added). The need for the separate litigation of causation and injury issues in millions of individual class member's claims "render[s] any efficiencies attainable through joint trial of common issues insufficient, as a matter of law, to make a class action certified…." *Lockheed Martin*, 29 Cal. 4th at 1111; *Stilson*, 28 Cal. App. 3d at 273 (where proof of entitlement to damages "would involve evidence of the mental and subjective state of each plaintiff . . . open[ing] a California court to the presentation of such evidence by an indeterminable portion of the 21 to 50 million unnamed plaintiffs would foist upon our judicial system an intolerable burden"); *In re Hotel Telephone Charges*, 500 F.2d 86, 89 (9th Cir. 1974) (noting that "[i]n a class of forty million, assuming only ten percent of these unknown class members came forward with claims, and assuming the proof of each claim required only ten minutes, approximately one hundred years would yet be required to adjudicate the claims," and concluding that "this suit raises far too many individual questions to qualify for class action treatment").

Moreover, individuals who have suffered actual harm by virtue of Defendants' ETFs will have adequate legal means to pursue their claims separately. The inexpensive and expedient resolution of individual ETF-related disputes in arbitration proceedings and small claims courts, as specifically provided for in many Defendants' customer service agreements,[12]

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[12] For example, the Verizon Wireless Service Agreement attached to the FAC [Verizon Wireless] provides for the use of different sets of rules depending on the value of the claim and the customer's choice. The customer may elect to proceed in small claims court instead of through arbitration for any claim over which small claims court has jurisdiction (in California, claims of up to $5,000). The arbitration provision provides that Verizon Wireless will pay all but $100 of the fees for filing and for the first day of arbitration if the customer participates in the company's mediation program. It further states that the arbitrator will decide the arbitrability of issues and can allocate the fees and costs of arbitration in any award.

presents a manageable, superior alternative to class treatment in this case.

D. The Named Plaintiffs Are Not Typical

Finally, Plaintiffs' motion fails the typicality requirement.

In order to represent a class, each named Plaintiff must "establish as a matter of fact that his claims [are] typical of the class he [seeks] to represent." *Caro*, 18 Cal. App. 4th at 666; *see also Sprague v. General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998). A named plaintiff must be a member of the proposed class and that plaintiff's claim and the class claims must be so interrelated that the interests of the class members will be fairly and adequately protected in their absence. *See Chern v. Bank of America*, 15 Cal. 3d 866, 874 (1976); *see also Broussard*, 155 F. 3d at 337-38. Specifically, the proposed representative (1) must be entitled to recover on the claim asserted so that he or she is a member of the class to be represented, *see Tinsley v. Palo Alto Unified Sch. Dist.*, 91 Cal. App. 3d 871, 886 (1979), (2) must have sustained the same or similar injury as the members of the proposed class, *see Caro*, 18 Cal. App. 4th at 664, 666, and (3) must assert all claims reasonably expected to be asserted by the members of the proposed class, *see City of San Jose*, 12 Cal. 3d at 464.

Here, none of the eleven[13] named Plaintiffs satisfies the typicality requirement. For the convenience of the Court, this joint brief sets forth some of the primary reasons why the named Plaintiffs fail the typicality requirement. The separate memoranda submitted by each Defendant discuss the named Plaintiffs in more detail.

1. Plaintiffs Who Are Not Seeking to Act as Class Representatives

Five of the eleven named Plaintiffs are not, or are no longer, purporting to act as class representatives. Mark Lyons, Rita Parrish and the Wireless Consumers Alliance, Inc. are non-subscribers who are suing only as uninjured representative Plaintiffs, and are not seeking to

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13 Plaintiffs' motion improperly lists Wendy Lowinger, Porsha Meoli and Sridhar Krishnan as moving parties. However, those Plaintiffs are suing AT&T Wireless, against which proceedings have been stayed. This brief does not discuss the AT&T Wireless Plaintiffs.

act as class representatives FAC [Nextel] ¶¶ 18, 19; FAC [Sprint] ¶ 19; SAC [T-Mobile] ¶ 18; *see also* Defendants' RJN, Ex. I (stipulation by the Wireless Consumers Alliance that it is not purporting to act as a class representative). In addition, Jerilyn Marlowe and Alisa Freeman have formally withdrawn as proposed class representatives.

2. Plaintiffs Who Are Not in the Class

Two of the named Plaintiffs are not members of the class that Plaintiffs seek to certify. Conor Vaughan is a former T-Mobile subscriber, who did not pay and was not charged an ETF when he terminated service. *See* Vaughan Depo. at 27:10-12, 27:21-22, 63:24-64:5 (Alinder Decl., Ex. D). Thus, he is not part of the class of "All California consumers who currently subscribe under a post-paid plan to the defendant's wireless services or who have paid an ETF to or have been charged an ETF by the defendant at any time from July 23, 1999 until the present." Plaintiffs' Motion at 6; *see also Chern*, 15 Cal. 3d at 874 ("The cases uniformly hold that a plaintiff seeking to maintain a class action must be a member of the class he claims to represent.") (citation omitted).

Ramzy Ayyad is also not a member of the proposed class, or at best is an atypical one. Ayyad, 21 years old, admitted in his deposition that he uses a Sprint account that is actually in his mother's name, that the bills from the account were sent to her in her name, and that he never had a Sprint account in his own name. Ayyad Depo. at 30:17-32:9, 34:14-35:10 (Alinder Dec., Ex. E). This Sprint account, in Ayyad's mother's name, was charged an ETF, and Ayyad paid the bill. *See id.* at 34:5-13; *see also* Sprint's separate brief.

Ayyad is not a member of the proposed class. It may be that he and his mother had an informal understanding that he would pay the charges on her Sprint account, but from Sprint's perspective, the only person legally obligated to pay the charges on the account was the mother. Certainly, Sprint could not have sued Ayyad for non-payment, nor did Sprint charge *him* an ETF. *See* Plaintiffs' Motion at 6 (defining the class). Even if Ayyad were somehow part of the class, he would be an atypical plaintiff because Sprint would have a defense, unique to Ayyad, that he lacks third-party standing to challenge the legality of a contract to which he is not a party. *See, e.g., Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) ("Because of [plaintiff's] unique situation, it is predictable that a major focus of the litigation will be on a defense unique to him. Thus, [he] fails to satisfy the typicality requirement of Rule 23(a)").

3. Current Customers Who Lack Injury, Causation or Standing

Three of the named Plaintiffs are current customers: Christina Nguyen, Gerry Robertson, and Katherine Zill. They are not members of the proposed class, or at best are atypical, because they have not suffered any injury as a result of the ETF and therefore lack standing to challenge it. They do not claim to have paid an ETF (being current customers), nor have these Plaintiffs established that the ETF deters them from switching service to a different carrier and price plan.

Plaintiff Nguyen, a T-Mobile and Verizon Wireless subscriber, testified that she is unaware whether the T-Mobile ETF applies to her at all[14] and that she does not know whether, in the absence of either the T-Mobile or Verizon Wireless ETF, she would switch to a different carrier[15] or price plan.[16]

Similarly, Plaintiff Zill testified that she was not "harmed at all in any respect" by, nor did she lose money or property as a result of, Sprint's ETF policy. Zill Depo. at 61:3-62:1 (Alinder Decl., Ex. C). She thinks that ETFs in general "restrict [her] choice to go elsewhere,"

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14 *See* Nguyen Depo. at 99:3-6 ("Q. Does T-Mobile's early termination fee policy apply to you in any way at all?... A. I don't know."); *id.* at 99:25-100:5 ("Q. [I]f you wanted to, could you call up T-Mobile today and say, 'Cancel my service.' And if you did that, would you have to pay an early termination fee? . . . A. I don't know.") (Alinder Decl., Ex. F).

15 *See* Nguyen Depo. at 114:7-12 ("Q. If there were no early termination fee, is it possible that you would stay with T-Mobile for other reasons? . . . A. I don't know."); *id.* at 180:21-181:2 ("Q. In the absence of an ETF provision, would you have discontinued service with Verizon Wireless?. . . . A. I don't know."); *id.* at 204:24-205:1 ("Q. Are you presently considering switching to any other wireless provider? A. I don't know. I don't know.") (Alinder Decl., Ex. F).

16 *See* Nguyen Depo. at 120:11-121:4 ("Q. Is there a cheaper rate plan with a different company that you would subscribe to, if there were no early termination fee? . . . A. I don't know. . . . [¶¶] Q. [H]ave you thought about a cheaper rate plan with a different company? A. No.") (Alinder Decl., Ex. F).

id. at 71:3-7, but she also made clear that the ETF is not what keeps *her* with Sprint: "I've just stayed with Sprint out of inertia." *Id.* at 80:16-17.

Plaintiff Robertson likewise testified that he regards wireless companies as "all probably pretty much the same" Robertson Depo. at 76:19-20 (Alinder Decl., Ex. G), and that he has not attempted to terminate his Nextel service because he felt he would "probably get treated the same way" no matter who his provider was. *Id.* at 81:24. Robertson has never tried to determine if he could save money by switching companies. *See id.* at 82:13-18.

These Plaintiffs cannot show that Defendants' ETF provisions caused them any injury, or even that they have standing to challenge them. Certainly, it would be impossible for these Plaintiffs to show that they "lost money or property as a result of" those ETF policies, which is now required a required showing under Proposition 64 to established standing to sue under the UCL. *See* page 11, above; *see also Collins,* 187 Cal. App. 3d at 73 (citation omitted) ("Each class member must have standing to bring the suit in his own right.").

4. Current Customers Are Not Typical of Former Customers Who Paid an ETF

Plaintiffs' motion seeks the certification of a class that includes former customers who were charged or who paid ETFs, even though there is no such named Plaintiff as to T-Mobile or Nextel. Presumably, Plaintiffs seek to bootstrap this class of former customers in through Nguyen and Robertson, the current T-Mobile and Nextel customers. There are two problems with that, however.

First, there is no boot to strap. As discussed above and in T-Mobile and Nextel's separate briefs, Nguyen and Robertson are themselves not members of the class.

Second, current customers are not typical of former customers who paid an ETF. The Court already so held in its June 2, 2004 order on T-Mobile's demurrer to Plaintiffs' unjust enrichment and money paid claims. *See* Order Sustaining Demurrer, dated June 2, 2004 (Defendants' RJN, Ex. H). The Court held that because none of the T-Mobile named Plaintiffs had paid an ETF, they could not sue for these common law claims. *Id.* The Court *also* ruled that a named Plaintiff who did not pay an ETF is *not typical* of an absent class member who did and thus cannot pursue class action allegations for unjust enrichment or money paid. *Id.* at 2.[17]

The Court's June 2 order applied to Plaintiffs' claims for unjust enrichment and money paid, which Plaintiffs assert in every complaint against all Defendants. *See* page 4 & n.4, above. With the passage of Proposition 64, Plaintiffs' three causes of action under the UCL now also require proof that each Plaintiff "lost money or property as a result" of the ETF provision, making these claims similar to unjust enrichment and money paid in this respect. Further, as explained, above, Plaintiffs' remaining claims under § 1671(d) and the CLRA also require individualized proof of damage. For all of Plaintiffs' claims, then, a current subscriber who has never paid an ETF is not typical of a former subscriber who did. *See, e.g., Caro*, 18 Cal. App. 4th at 664-66 (affirming denial of class certification where named plaintiff's claims were not typical, because his injury was not the same or similar to members of the proposed class).

5. Former Customer with No Standing, Injury or Causation

The one remaining named Plaintiff, Molly White, is a former customer of Verizon Wireless who terminated her two-year contract with nineteen months remaining and was charged an ETF. White likewise did not suffer any injury as a result of the ETF and is therefore atypical because her prospective liability to Verizon Wireless likely is more than $1000, which vastly exceeds the $175 ETF she paid. *See* Verizon Wireless Separate Brief. White, in other words, is one of those customers who was benefited, not injured, by the ETF.

In sum, the Court can deny Plaintiffs' motion for class certification on typicality grounds alone.

V. CONCLUSION

For all of the foregoing reasons, as well as the arguments set forth in Defendants' accompanying individual briefs, Plaintiffs' motion for class certification should be denied.

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17 The Court ordered the Plaintiffs to file a further amended complaint that either dropped these common law claims or added named Plaintiffs with standing to pursue them. Plaintiffs never complied with the Court's order.

DATED: January 18, 2005

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